IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1297

MORRIS H. MILLS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

GILBERT S. MERRITT
230 Fourth Avenue, North
Nashville, Tennessee 37219

Attorney for Petitioner.

Of Counsel:

GULLETT, STEELE, SANFORD,
ROBINSON & MERRITT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case February 18, 1977.

OPINIONS BELOW

Neither the memorandum opinion of the District Court, printed in Appendix B hereto, *infra*, p. 1b, nor the opinion of the Court of Appeals, printed in Appendix B, *infra*, p. 4b, are reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 18, 1977 (App. B. p. 6b). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Is a District Court Order overruling a pre-trial motion to dismiss one count of a multi-count indictment an appealable "final decision" under 28 U.S.C. § 1291 when the motion in question seeks to dismiss the count for the reason that it violates the Double Jeopardy Clause by charging exactly the same wrong as is charged in another count of the same indictment and will, if tried, put the defendant in jeopardy of conviction twice for the same offense?

STATUTES INVOLVED

Title 28 U.S.C. § 1291 and Title 18 U.S.C. § § 215 and 656 are set forth in Appendix A hereto.

STATEMENT OF THE CASE

This case raises the same basic question presented in *Abney v. United States*, No. 75-6521, certiorari granted, 44 *Law Week* 3744 (June 22, 1976), argued January 17, 1977, 45 *Law Week* 3504, concerning the appealability under 28 U.S.C. §1291 of a District Court Order overruling a motion attacking an indictment on double jeopardy grounds. Is the order appealable prior to trial or must the defendant await conviction to seek review of his double jeopardy claim? That is the basic question.

On June 15, 1976, the government indicted the petitioner, defendant below, charging him in three counts,

the first for conspiracy in violation of 18 U.S.C. § 371, the second for making a payment to a bank officer in exchange for a loan in violation of 18 U.S.C. § 215, and the third charging a violation of 18 U.S.C. § 656 for making the same payment to the same bank officer for the same loan. (App. 7b) Defendant asserts that the government violates the Double Jeopardy provision of the Fifth Amendment, placing him in jeopardy of conviction twice, by separately prosecuting him under both § § 215 and 656 of Title 18 for the single act of paying a kickback to a banker for a loan.

The operative language of the two statutes is as follows:

Misdemeanor Statute §215	Felony Statute §656
Whoever, being an officer ... of any bank ... stipulates for or receives or consents or agrees to receive any fee ... from any person ... for procuring or endeavoring to procure ... any loan ... shall be fined not more than $5,000 or imprisoned not more than one year or both ...	Whoever, being an officer ... of ... any ... bank ... embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank ... shall be fined not more than $5,000 or imprisoned not more than five years, or both ...

Defendant moved in the District Court to dismiss the § 656 count of the indictment on grounds that double prosecution under both § § 215 and 656 for the same alleged kickback violates the concept of double jeopardy. The two counts seek to convict the defendant for the

same act, as the operative language of the two counts of the Indictment quoted below demonstrate:

Misdemeanor Prosecution Count 2	Felony Prosecution Count 3
On or about July 5, 1973 . . . Morris H. Mills did induce Thomas W. Murrey and Jesse A. Barr, who were [bank officers] . . . to stipulate for, agree to receive and to receive a thing of value, to wit, fees totaling $50,000 for procuring, processing and approving a loan commitment in the amount of $2,200,000 . . . in violation of Title 18, United States Code, §215 and §2.	On or about July 5, 1973 . . . Morris H. Mills . . . did . . . induce Jesse A. Barr and Thomas W. Murrey, who were [bank officers] . . . to embezzle and willfully misapply . . . funds and credits of said Bank . . . in that, Jesse A. Barr and Thomas W. Murrey caused said Bank to approve a loan commitment in the amount of $2,200,000 to Erect-O-Therm Structures, Inc., . . . by representing . . . that the $2,200,000 was to be used to purchase land for the development and construction of a motel in Prescott, Arkansas, whereas, in truth and fact . . . $25,000 each was paid to Jesse A. Barr, Thomas W. Murrey . . . in violation of Title 18, United States Code, §656 and §2. (App. 1a)

The District Court overruled the defendant's motion to dismiss the third count on double jeopardy grounds without explaining the basis for its decision. (App. 1b) On appeal to the Sixth Circuit Court of Appeals, that Court dismissed the appeal on grounds that the order of the District Court overruling the defendant's motion to dismiss is not an appealable final order under 28 U.S.C. §1291 (App. 1a). Petitioner seeks review of that decision.

REASONS FOR GRANTING THE WRIT

There is a conflict among the circuits on the issue presented by this case. This court has granted review of the same question in the case of *Abney v. United States* No. 75-6521, 44 *Law Week* 3744 (June 22, 1976), argued January 17, 1977, 45 *Law Week* 3504. Other circuits disagree with the decision of the court below holding that an order overruling a motion to dismiss on double jeopardy grounds is not an appealable "final decision" under 28 U.S.C. §1291. Other circuits have heard appeals from such orders prior to the trial which constitutes the claimed violation of the Double Jeopardy Clause. These other circuits have determined such pretrial orders to be "final decisions" on the ground that unless the appellate court is willing to address the question at the pretrial stage, a defendant is without remedy for the constitutional wrong because he will not be able to remedy the unconstitutional dual prosecution for the same offense until after the prosecution has already taken place. In addition to the *Abney* case, *supra*, from the Third Circuit, decisions from the Second, Fourth and Eighth Circuits also hold that such a pretrial double jeopardy order is appealable. *United States v. Barket*, 530 F.2d 181, 186 (8th Cir. 1975) ("review thus cannot" be denied because "if this appeal is not heard now, appellant will lose his claimed [double jeopardy] right"); *United States v. Beckerman*, 516 F.2d 905, 906 (2d Cir. 1975) ("the [double jeopardy] right will be invaded" without remedy if appeal cannot be heard prior to defendants' being "called upon to suffer the pain" of double prosecution); *United States v. DiSilvio*, 520 F.2d 247 (3rd Cir. 1975) (same);

United States v. Lansdown, 460 F.2d 164 (4th Cir., 1972) (same).

In *Ball v. United States*, 163 U.S. 662, 669 (1896), the Supreme Court outlined the values or interests which the Double Jeopardy Clause is designed to protect. The Court said that the double jeopardy "prohibition is not against being twice punished, but against being twice put in jeopardy." This same interest is again described by the Supreme Court in *Green v. United States*, 355 U.S. 184, 186 (1957).

Recently, in *Ash v. Swenson*, 397 U.S. 436, at Note 10, 455 (1970), this Court speaking through Mr. Justice Stewart, restating the same basic considerations, admonished lower courts to be on their guard against prosecutorial multiplication of offenses which violates values protected by the Double Jeopardy Clause:

> [A]t common law, and under early federal criminal statutes, offense categories were relatively few and distinct. A single course of criminal conduct was likely to yield but a single offense . . . In more recent times with the advent of specificity in draftsmanship and the extraordinary proliferation of overlapping and related statutory offenses, it became possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction . . . As the number of statutory offenses multiplied, the potential for unfairness and abusive prosecution became far more pronounced.

Petitioner's position on the merits in the instant case is that the Double Jeopardy Clause is violated when the government places a person twice in jeopardy by seeking multiple convictions for the same offense either at the same or at successive trials. Petitioner asserts that two counts of an indictment represent in law two charges and two prosecutions. The Double Jeopardy Clause is violated

when the two charges and the two prosecutions are for the same wrong. Unless the appellate court is willing to hear his claim now before the double trial which itself constitutes the constitutional violation, petitioner does not have a remedy, for the Double Jeopardy Clause prohibits being "twice put in jeopardy," not simply being twice convicted or twice punished. This analysis of the Double Jeopardy Clause was first enunciated by the Supreme Court of Pennsylvania in an early case in which it said, "there is a wide difference between a verdict given and the jeopardy of a verdict," since "hazard, peril, danger, jeopardy of a verdict cannot mean a verdict given." *Commonwealth v. Cook*, 6 S&R 577, 596 (1822). The Federal Courts have followed this rationale. *Ball v. United States*, 163 U.S. 662 (1896). See Sigler, *Double Jeopardy*, 42 (Cornell Univ. Press, 1969).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

GILBERT S. MERRITT
230 Fourth Avenue, North
Nashville, Tennessee 37219

Attorney for Petitioner.

Of Counsel:

GULLETT, STEELE, SANFORD,
ROBINSON & MERRITT

APPENDIX

APPENDIX A

Title 28, § 1291, U.S.C. provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

Title 18, § 215, U.S.C. provides:

> Whoever, being an officer, director, employee, agent, or attorney of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, of a Federal intermediate credit bank, or of a National Agricultural Credit Corporation, except as provided by law, stipulates for or receives or consents or agrees to receive any fee, commission, gift, or thing of value, from any person, firm, or corporation, for procuring or endeavoring to procure for such person, firm, or corporation, or for any other person, firm, or corporation, from any such bank or corporation, any loan or extension or renewal of loan or substitution of security, or the purchase or discount or acceptance of any paper, note, draft, check, or bill of exchange by any such bank or corporation, shall be fined not more than $5,000 or imprisoned not more than one year or both.

Title 18, § 656, U.S.C. provides:

> Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys,

funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; and "insured bank" includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation.

ORDER OF DISTRICT COURT

ORDER ON PRE-TRIAL MOTIONS

On August 20 and August 27, 1976, the Court heard arguments by all defendants on all pre-trial motions filed in these cases (including a number of pre-trial motions filed, argued and ruled on before the indictments in these cases were partially dismissed and subsequently superseded). As the record will indicate, the Court heard arguments on all said motions, and after fully considering said arguments, memoranda submitted in support of and in opposition to said motions, and upon the entire record, the Court orally ruled on all said motions and stated the Court's reasons for said rulings. The purpose of this Order is to incorporate said rulings.

With regard to the Motions to sever Counts IV and V filed by defendants Barr and Murrey, in CR-75-154, said motions are granted.

With regard to the motions to dismiss based on prejudicial delay filed by the defendants, Whittington and Todd, in CR-75-154, the Court declines to rule on said motions at this time and will allow the defendants to renew said motions at the conclusion of the trial of that case.

With regard to the motion for Bill of Particulars filed by the defendant, Mills, in CR-75-154, the Court grants said motion and directs the Government to set forth allegations as to whom the Government contends money was paid and as to whether the Government contends that Mills had knowledge of the various overt acts set forth in the Indictment.

With regard to the motions to suppress the grand jury testimony of the defendant, Mills, in December, 1974, and docu-

ments produced by the defendant Mills in January, 1975, the Court grants said motions at this time. However, with regard to the documents that have been suppressed, the Court defers ruling on whether certain of said records may be subpoenaed by the Government for trial, as orally contended by the Government, and whether all of said records and all copies of said records should be returned, as orally contended by the defendant Mills, and will rule on any motions to quash a subpoena or return copies of the documents after written motions are filed.

With regard to the motion for continuance of CR-75-154 made by the defendant Mills, joined in by the defendants Barr and Murrey, and opposed by the defendants Whittington and Todd, the Court finds that said motion under the particular circumstances presented should be granted. In CR-75-129 the defendants Barr and Murrey, and their co-defendants, are presently set for trial on September 7, 1976. All parties in that case estimate that the trial could last several weeks. The defendant Murrey is represented in CR-75-129 by Carl Langschmidt, who also represents both Barr and Murrey in CR-75-154, which is set for trial on October 4, 1976. In addition to the obvious fact that the two cases very likely could overlap, and the attorney for Barr and Murrey would be deprived of an opportunity to adequately prepare for the second case, there are a number of other considerations orally set forth by the Court when considering said motion on August 27, 1976, which require the Court to find that under § 3161(h)(8) of the Speedy Trial Act the interests of justice would best be served by granting said motion and resetting CR-75-154.

With regard to the motions to dismiss the conspiracy counts filed by all defendants in both cases on the grounds that a conspiracy which charges as its object a violation of 18 U.S.C. § 215 violates **Wharton's Rule** and the principle espoused in **Gebardi v. United States,** 287 U.S. 112 (1932), the Court finds

after fully considering the arguments and contentions of the defendants that said motions should be overruled and denied. Among other things, the Supreme Court has recently indicated in **Iannelli v. United States,** 420 U.S. 770 (1975) that even if there is a violation of the **Wharton Rule** the appropriate remedy is not pre-trial dismissal of the conspiracy charge, but to avoid dual punishment at the time of sentencing. Therefore, the Court will overrule all motions to dismiss the conspiracy counts at this time.

With regard to the motions by all defendants in both cases to dismiss the substantive counts based on 18 U.S.C. § 656 (Embezzlement and Willful Misapplication) on the grounds that said counts do not allege a crime, the Court finds that the defendants' arguments are without merit. After fully examining the authorities cited, among others, the Court finds that the cases hold that a misapplication charge is properly alleged in each of the counts. See **United States v. Fortunato,** 402 F.2d 79 (2nd Cir. 1968), **cert. denied,** 394 U.S. 933; **Robinson v. United States,** 30 F.2d 25 (6th Cir. 1929); **Galbreath v. United States,** 257 F. 648, 656 (6th Cir. 1918).

With regard to all other motions filed by the defendants, not specifically referred to herein, all of said motions are hereby overruled and denied for the reasons stated on August 20, 1976 and August 27, 1976.

It is so Ordered.

Enter this 1 day of September, 1976.

/s/ BAILEY BROWN
Chief United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 76-2386

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MORRIS H. MILLS,

Defendant-Appellant.

ORDER

Before: CELEBREZZE, PECK and McCREE, Circuit Judges.

Appellant appeals from the denial of a pretrial motion to dismiss an indictment for bribery and conspiracy to bribe an officer of a federally insured bank in violation of 18 U.S.C. §§2, 215 and 656 (1970), and for conspiracy to defraud the Government in violation of 18 U.S.C. §§2 and 371 (1970). Appellant claims, *inter alia*, that charging him with violations of §§215 and 371 violates both the statutory construction of the sections and the double jeopardy clause of the Fifth Amendment. The Government has moved that the appeal be dismissed for lack of a final appealable order under 28 U.S.C. §1291 (1970).

The denial of a motion to dismiss an indictment is not a final appealable order. *Hoffa v. Gray*, 323 F.2d 178 (6th Cir. 1963). While we are aware that other circuits have recognized an exception to this general rule where the motion alleges a violation of double jeopardy, *see*

e.g., United States v. Lansdown, 460 F.2d 164, 170-72 (4th Cir. 1972). That exception is only applicable where a defendant has already stood trial and faces the clear possibility of a second trial on the same offense. Such is not the case here. Appellant has not been brought to trial and been placed in jeopardy. Accordingly, the order denying Appellant's motion to dismiss the indictment was not a final appealable order under 28 U.S.C. §1291, and the Government's motion to dismiss the appeal is granted.

It is therefore ORDERED that the appeal be, and it is, hereby dismissed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 76-2386

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MORRIS H. MILLS,

Defendant-Appellant.

ORDER

Before: CELEBREZZE, PECK and McCREE, Circuit Judges.

The Petition for Rehearing is hereby denied.

The Order of January 26, 1977, is amended by striking out 371 in line 7, and inserting in lieu thereof 656.

ENTERED BY ORDER OF THE COURT
/s/ John P. Hehman,
Clerk

INDICTMENT

In the United States District Court for the
Western District of Tennessee
Western Division

United States of America,

vs.

Carl Whittington; Wayne A. Todd; Thomas W. Murrey; Jesse A. Barr; William H. Durbin; and Morris H. Mills.

INDICTMENT

The Grand Jury Charges:

Count One

[Conspiracy Count]

Count Two

On or about July 5, 1973, in the Western District of Tennessee, the Defendants, William H. Durbin and Morris H. Mills, did cause and did aid, abet, counsel and induce the Defendants, Thomas W. Murrey and Jesse A. Barr, who were officers and employees of the Union Planters National Bank of Memphis, Memphis, Tennessee, the deposits of which were insured by the Federal Deposit Insurance Corporation, to stipulate for, agree to receive and to receive a thing of value, to-wit, fees totaling $50,000 for procuring, processing and approving a loan commitment in the amount of $2,200,000 out of which approximately $582,000 was loaned from the Union Planters

National Bank of Memphis on or about July 5, 1973; in violation of Title 18, United States Code, Section 215 and Section 2.

[nm $5,000 or nm 1 yr., or both]

Count Three

On or about July 5, 1973, in the Western District of Tennessee, the Defendants, Morris H. Mills, and William H. Durbin, did cause, and did aid, abet, counsel and induce the Defendants, Jesse A. Barr and Thomas W. Murrey, who were employees of the Union Planters National Bank of Memphis, Memphis, Tennessee, an insured Bank, unlawfully and knowingly to embezzle and wilfully misapply, and cause to be embezzled and wilfully misapplied, the monies, funds and credits of said Bank, with intent to injure, defraud and deceive said Bank, in that, the Defendants, Jesse A. Barr and Thomas W. Murrey, caused said Bank to approve a loan commitment in the amount of $2,200,000 to Erect-O-Therm Structures, Inc., $582,000 of which was disbursed on or about July 5, 1973, by representing and causing to be represented to said Bank, that the $2,200,000 was to be used to purchase land for the development and construction of a motel in Prescott, Arkansas, whereas, in truth and fact, as the Defendants then well-knew, $75,000 of the loan proceeds, be and was diverted from Erect-O-Therm Structures, Inc., and $25,000 each was paid to Jesse A. Barr, Thomas W. Murrey and William H. Durbin, and converted by them to their own personal use; in violation of Title 18, United States Code, Section 656 and Section 2.

[nm $5,000 or nm 5 yrs., or both]

Count Four

[Perjury Count Charging Defendant Barr]

Count Five

[Perjury Count Charging Defendant Murrey]

No. 76-1297

In the Supreme Court of the United States

OCTOBER TERM, 1976

MORRIS H. MILLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1297

MORRIS H. MILLS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that a pretrial order by the district court declining to dismiss an indictment on double jeopardy grounds may be appealed by the accused prior to trial.

An indictment returned on June 15, 1976, in the United States District Court for the Western District of Tennessee charged petitioner and others with conspiring to defraud the government (Count I), with bribery in connection with a loan made by a federally insured bank, in violation of 18 U.S.C. 215 and 2 (Count II), and with misapplication of the funds of a federally insured bank, in violation of 18 U.S.C. 656 and 2 (Count III). Petitioner moved before trial to dismiss Count III, contending that a trial on both Counts II and III would violate the Double Jeopardy Clause of the Fifth Amendment. The district court denied the motion (Pet. App. 3b).

Petitioner immediately appealed. The court of appeals dismissed the appeal, following *Hoffa* v. *Gray*, 323 F. 2d 178 (C.A. 6), which had held that double jeopardy contentions, like other claims of constitutional error, must await review in the ordinary course if the defendant is convicted. The court of appeals recognized (Pet. App. 4b-5b) that other courts have entertained pretrial appeals to resolve double jeopardy questions, but it concluded that even if it were disposed to follow those other decisions petitioner would not be entitled to appellate review before trial. Those cases, the court of appeals explained, allowed immediate review only when a defendant already had stood trial and was contending that his *second* trial would violate the Double Jeopardy Clause; petitioner, however, has yet to stand trial.

The question presented by petitioner is similar to the question before the Court in *Abney* v. *United States*, No. 75-6521, argued January 17, 1977. We submit, however, that there is no need to hold this case pending the Court's disposition of *Abney*. However the Court may decide *Abney*, petitioner will derive no benefit.[1] The court of appeals correctly pointed out that the foundation for the argument that double jeopardy claims may be appealed before trial is that the Double Jeopardy Clause protects against multiple trials and that this protection might be diluted if double jeopardy claims could not be reviewed on appeal until after the second trial had ended. Here, however, petitioner has yet to be tried a first time. Nothing in petitioner's arguments, even if they were correct, would block his pending trial. His double jeopardy claim pertains only to Count

[1]Under such circumstances, this Court has denied petitions for certiorari even though *Abney* claims are raised. See *Young* v. *United States*, No. 76-704, certiorari denied, December 13, 1976; *Fielhauer* v. *United States*, No. 76-6227, certiorari denied, March 21, 1977.

III of a multi-count indictment. He will be tried no matter what disposition is made of his contentions. Accordingly, the petition for a writ of certiorari should be denied forthwith, so that the trial of petitioner (and of his co-defendants) can proceed.

We submit, moreover, that this case is an illustration of our argument in *Abney* that many contentions can be disguised in double jeopardy language, and that a rule allowing pretrial appeals of double jeopardy claims could provide lengthy delay (as it has in this case) to defendants who believe that delay is advantageous. Petitioner's contention is nothing more than that Counts II and III are multiplicitous. That claim is based entirely upon statutory construction, and it does not implicate any interests protected by the Double Jeopardy Clause. "[A]n accused must suffer jeopardy before he can suffer double jeopardy" (*Serfass* v. *United States*, 420 U.S. 377, 393), and petitioner has never been put in jeopardy on either Count II or Count III. Whether or not petitioner may be *convicted* on both Count II and Count III, there is no constitutional reason why he may not be *tried* on both counts.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

MARCH 1977.

[2]What is more, the counts are not multiplicitous. A person may bribe an officer of the bank without misapplying bank funds, and he may misapply bank funds without using the money as a bribe. Cf. *Iannelli* v. *United States*, 420 U.S. 770, 785 n. 17; *Blockburger* v. *United States*, 284 U.S. 299.